

**ADMINISTRATIVE APPEAL DECISION  
PROFFERED PERMIT DECISION for the  
NEW YORK STATE CANAL CORPORATION  
Buffalo District File No. 2004-01156 (0)**

**29 December 2005**

**Review Officer:** James W. Haggerty, U.S. Army Corps of Engineers, North Atlantic Division, New York, New York, on behalf of the Great Lakes & Ohio River Division

**Appellant Representative:** Mr. Peter Casper, Assistant Counsel, New York State Canal Corporation

**Authority:** Rivers and Harbors Act, Section 10 (33 U.S.C. 403) and the Clean Water Act, Section 404 (33 U.S.C. 1344)

**Appeal Conference:** 20 September 2005

**Background Information:** On 4 February 2004, the Buffalo District received an application for a Department of the Army ("DA") permit from the New York State Canal Corporation ("Canal Corporation" or "the appellant") for a five-year navigational maintenance dredging permit at various dredge site locations within the Erie, Seneca and Oswego Canal portions of the New York State Canal System between the City of North Tonawanda, Niagara County and the Town of Waterford, Saratoga County, New York. The Champlain Canal, which comprises the fourth segment of the overall canal system, is not included within this permit application since it lies entirely within the regulatory boundaries of the New York District. Until the mid-1990's a portion of the easternmost stretch of the Erie Canal was within the regulatory boundaries of the New York District, but regulatory authority over this portion of the canal was transferred to the Buffalo District in an agreement between the Corps' North Atlantic Division and the Great Lakes and Ohio River Division.

Dredging of navigational channels within the aforementioned portions of the New York State Canal System would be performed by both mechanical and hydraulic means. Disposal of most of the hydraulically dredged or mechanically dredged material would be at designated Upland Disposal Sites (UDSs). The applicant has over 40 designated UDSs adjacent to portions of the canal system, and the Buffalo District has determined that these UDSs are acceptable for disposal of dredged material. Some of the dredged material would be beneficially reused. Another adjunct jurisdictional activity is the temporary placement of hydraulically dredged or mechanically dredged material into designated "wet dump" areas located throughout the Erie Canal system. The applicant proposes to dredge approximately 2.5 million cubic yards of material during the five-year life of the DA permit.

The Buffalo District processed the permit application throughout calendar year 2004 and issued an initial proffered permit on 1 February 2005. By letter dated 24 February 2005, the Canal Corporation objected to the initial proffered permit for several reasons. The first reason, under the heading of General Procedural Issues, included several instances where the Canal

Corporation believed the review process and decision did not comply with several procedural regulations. The Canal Corporation raised nine additional specific objections to the following special conditions of the initial proffered permit:

- Special Condition #'s 7, 15, 16 and 17, imposing requirements pertaining to "wet dumping" of dredged material;
- Special Condition #7, requiring a delineation of potentially regulated wetlands within recently used UDSs;
- Special Condition #8, prescribing submission of a monthly dredge schedule;
- Special Condition #9, specifying that UDS functional overflow return pipes shall discharge return water into the canal, with the exception of eight UDS locations where return water may be discharged into the Mohawk River;
- Special Condition #10, requiring a qualified individual to monitor the turbidity of return water discharges from the UDSs into the canal and the Mohawk River;
- Special Condition #11, prescribing placement of erosion control practices prior to any grading or filling operations located in and around UDSs;
- Special Condition #16, requiring the Canal Corporation to submit dredged material testing analyses to the U.S. Environmental Protection Agency (USEPA) and the U.S. Fish & Wildlife Service (USFWS);
- Special Condition #17, prescribing a timeframe of up to 90 days for review of testing analyses by USEPA and USFWS
- Special Condition #20, imposing a seasonal restriction on dredging and discharge of dredged material in Oneida Lake upstream to Fish Creek.

After consideration of the Canal Corporation's objections, the Buffalo District issued a proffered permit on 17 March 2005. The proffered permit included modifications to Special Condition #'s 1, 7, 8, 9, 11, 17 and 20. Modified Special Condition #20 was renumbered in the proffered permit in place of Special Condition #10, which was dropped. Therefore, the proffered permit did not include the requirement for return water turbidity monitoring that was specified in the initial proffered permit.

On 13 May 2005, the Great Lakes and Ohio River Division received the Canal Corporation's request for appeal of the Buffalo District's proffered permit. However, negotiations continued between the Buffalo District and the Canal Corporation in an attempt to find a mutually agreeable solution outside the realm of the Administrative Appeal Process. These negotiations culminated in a decision by the Buffalo District on 31 August 2005 to separately authorize an annual maintenance dredging permit with upland disposal. The Canal Corporation has accepted the permit and its terms and conditions. The present appeal request now pertains to a separate proffered DA permit that, if issued, would authorize temporary in-water placement of dredged material, i.e. "wet dumping". As indicated in the Great Lakes and Ohio River Division Acting Commander's letter dated 15 September 2005, three of the eight reasons for appeal have been rendered moot as a result of issuance of the separate permit authorizing dredging with upland disposal. The remaining five issues—general procedural arguments, temporary in-water placement of dredged material (sans upland disposal implications), reporting return flow, and duplicative agency review—have been retained and will be analyzed in this decision document.

**Summary of Decision:** The appellant's request for appeal has merit because the District Engineer erred by considering an alternative that is not available to the applicant to be a practicable alternative for this permit application. Also, the imposition of two special conditions was insufficiently supported in the District's administrative record (Environmental Assessment/Statement of Findings "EA/SOF").

**Appeal Evaluation, Findings and Instructions to the Buffalo District Engineer:**

**Reason 1: General Procedural Arguments:** "The Buffalo District's review of the NYSCC's permit application for maintenance dredging has been excessive, duplicative and overly time consuming. The review has been progressed at a level expected for the construction of a new facility, not the routine maintenance of a Canal System which has been in operation for over eighty years. The Buffalo District has appeared to focus solely on duplicating the efforts of the NYSDEC in regard to environmental concerns, without fully considering the needs of the people of the State of New York and the United States...Moreover, the Buffalo District review fails to consider the criteria found at 33 CFR 320.4 (a)(2)."

**Finding:** This reason for appeal does not have merit.

**Action:** None required.

**Discussion:** The Canal Corporation points to duplication of conditions that already exist in the Section 401 State Water Quality Certification, and notes that 33 CFR 320.1(a)(5) states that the Corps believes that state and federal regulatory programs should complement rather than duplicate one another. Pursuant to 33 CFR 325.4 (a)(1) and Section 401 (d) of the Clean Water Act, special conditions of a Section 401 State Water Quality Certification automatically become special conditions of a DA permit. According to the Canal Corporation, the duplicative review and imposition of duplicative requirements resulted in an undue delay in arriving at a final decision. The Canal Corporation then indicates they believe that the Buffalo District failed to consider the general evaluative criteria at 33 CFR 320.4(a)(2) that are to be considered in the evaluation of every permit application.

Issues relating to the amount of time spent in processing a permit application and perceived duplication of effort and requirements are not appealable. As stated at 33 CFR 331.5(a)(2), reasons for appeal include, but are not limited to, the following: a procedural error; an incorrect application of law, regulation or officially promulgated policy; omission of material fact; incorrect application of the current regulatory criteria and associated guidance for identifying and delineating wetlands; incorrect application of the Section 404(b)(1) Guidelines (see 40 CFR Part 230); or use of incorrect data. The Buffalo District wove its required discussion of the general evaluative criteria at 33 CFR 320.4(a)(2) into Paragraph 2 of Section 3 of the EA/SOF. Therefore, this reason for appeal does not have merit.

**Reason 2: In-Water Placement of Dredged Material:** "The final permit excludes the common practice of temporary in-water placement of dredge material, and has imposed special condition numbers 7, 15, 16 and 17, which severely hinder the NYSCC's ability to

**meet its statutory mandate to maintain navigable channels...For example, without the use of temporary in-water placement of dredge material, the NYSCC's fleet of existing mechanical dredging equipment will be rendered useless to the maintenance of the navigational channel. The mechanical dredging equipment is vital to the success of the Canal System by dredging areas of the Canal that are beyond the reaches of the NYSCC's existing hydraulic dredges. Mechanical dredging is the only practicable alternative at this time since the available upland disposal sites are decreasing due to environmental concerns and community development."**

**Finding:** This reason for appeal has merit.

**Action:** Pursuant to 33 CFR 325.4, the District shall evaluate, and reconsider as appropriate, the basis for the special conditions in the EA/SOF, and how those conditions are directly related to the practice of "wet dumping."

**Discussion:** The Canal Corporation states that the special permit conditions in the proffered "wet dump" permit would severely hinder their ability to meet their statutory requirement under New York State law to maintain navigable channels in the canal system. The fleet of existing mechanical dredging equipment would be rendered useless if the "wet dump" practice (temporary in-water placement of dredged material) could not be continued, or if it is overly restricted by permit conditions. Mechanical dredges must be used in areas of the canal system that are beyond the reaches of existing hydraulic dredges, and the practice of mechanical dredging must continue since UDSs are becoming more scarce due to environmental concerns and community development.

The Canal Corporation indicates that "wet dumping" is only proposed in sites where this has been an historic practice, and that the "wet dumping" is a temporary placement of dredged material, and not disposal. The practice of "wet dumping" involves movement via dredge scows of material that is dredged from another location with the material being placed in the water adjacent to a site that is already proposed for hydraulic dredging with disposal at a UDS. The "wet dump" material is dredged within the same dredging season, sometimes within the same day. Because of the temporary nature of the in-water placement of dredged material, the Canal Corporation contends that this practice has only minimal detrimental effects. The appellant believes that the current structure of the permit conditions for "wet dumping" greatly reduces its ability to dredge in instances where a Tier 2 evaluation is deemed necessary under the Inland Testing Manual. These conditions require the Canal Corporation to conduct sediment testing and send the results to the Buffalo District, USEPA, and USFWS for a review period of up to 90 days, thereby leaving a short period of time near the latter part of the year to conduct dredging. This would hinder the Canal Corporation's mandate to keep the canal system safe for navigation.

The Canal Corporation points out the EA/SOF states that the least damaging alternative is dredging by mechanical or hydraulic means with disposal at UDSs. The appellant adds that the district incorrectly assumed that hydraulic offloading of dredge scows is a practicable alternative when it determined that this type of operation is the least damaging "alternative" and should be used as an alternative to "wet dumping". Notwithstanding this position, the Canal Corporation has proposed capital expenditures to purchase barge-mounted hydraulic offloaders. The initial

cost is estimated at \$2 million, with an additional \$1 million necessary for three dredge scows. The earliest anticipated deployment date for the first hydraulic offloader is fall 2006; a total of four offloaders would be needed for the canal system, which would cost in excess of \$12 million.

Until a sufficient number of offloaders and scows are purchased and operational, the Canal Corporation maintains that their use should not be considered a practicable alternative to "wet dump" placement of dredged material for purposes of this decision. In the Section 404 (b)(1) of the Clean Water Act Guidelines, an alternative is defined as being practicable if it is available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes. Since this equipment is not currently available to the Canal Corporation, the District Engineer should reassess his Section 404 (b)(1) of the Clean Water Act Guidelines analysis of alternatives to determine whether use of this equipment is a practicable alternative for this permit application.

Conditioning permits is described at 33 CFR 325.4 (a), which states that special conditions will be added to satisfy legal requirements or to otherwise satisfy the public interest requirement. Compliance with the Section 404 (b)(1) of the Clean Water Act Guidelines is specifically mentioned as one legal requirement that may be satisfied by means of a special permit condition. However, the Buffalo District's EA/SOF does not clearly link the imposition of special conditions pertaining to "wet dump" dredging as the vehicle to ensure compliance with the Section 404 (b)(1) of the Clean Water Act Guidelines.

For these reasons, this reason for appeal has merit.

**Reason 3: Reporting: "Special Condition number 8 requires extensive and excessive reporting requirements. The NYSDEC Water Quality Certification requires the NYSCC to provide a schedule for navigational dredging each year. At the end of the year the NYSDEC also requires submission of an annual report to include the actual sites and amount dredged. In the past, the Buffalo District has only required these reports be submitted to their office for tracking purposes. While the NYSCC is prepared to advise the Buffalo District of its dredge schedule and provide an annual report, the requirement of monthly reporting is excessive. Additionally, the EA/SOF and rationale for decision fail to provide any supporting documentation as to why such excessive reporting is required. Unless there is a regulatory basis for this additional and duplicative reporting, the NYSCC objects to these new monthly reporting requirements."**

**Finding: This reason for appeal does not have merit.**

**Action: None required.**

**Discussion:** As stated previously, the imposition of special permit conditions is governed by the requirements of 33 CFR 325.4(a) as necessary to satisfy the public interest requirement. The Canal Corporation believes the requirement set forth in Special Condition #8 to submit a monthly dredge report to the Buffalo District is excessive, especially in light of a requirement by NYSDEC that the Canal Corporation provide a yearly maintenance dredging schedule. It should be noted, however, that 33 CFR 325.6(e) states that the district engineer will require notification

by a permittee prior to actual performance of maintenance dredging to ensure continued compliance with 33 CFR 320-324. Therefore, the requirement for a monthly dredge report as set forth in Special Condition #8 is not unreasonable because the regulations prescribe advance notification to the district of maintenance dredging events.

**Reason 4: Return Flow:** "Special condition number 9 identifies several functional return outflow pipes which discharge return water directly into the Canal. The regulation of the return flow in this permit is a duplication of work authorized under nationwide permit 16 since the return water is controlled by the state through the Water Quality Certification procedures...As long as the NYSCC is controlling return flow in accordance with WQC requirements, the designation of a receiving water body into which the discharge flows is unnecessary. These conditions imposed on the NYSCC do not apply to any other individuals or organizations using the Nationwide Permit with the Buffalo District's jurisdiction...These conditions are unsupported by any evidence and are arbitrary and capricious. The NYSCC requests the condition be removed."

**Finding:** This reason for appeal has merit.

**Action:** The District shall evaluate the imposition of this special condition in accordance with the requirements of 33 CFR 325.4 (a) and reconsider its determination as appropriate.

**Discussion:** The Canal Corporation objects to Special Condition #9, which prohibits return flow or effluent from UDSs into adjacent streams, rivers, wetlands or over land (presumably uplands beyond the limits of the UDSs). They believe that Nationwide Permit #16 authorizing return flow from contained UDSs does not allow for a designation of a receiving waterbody into which return flows can be discharged.

Nationwide Permit #16 authorizes the return flow into waters of the United States from a contained UDS provided a site-specific or generic state Section 401 of the Clean Water Act certification is issued. In the present case, NYSDEC has issued a generic certification for the entire project, with the exception of several specific locations. The District Engineer has the authority to impose a special condition on an authorization under Nationwide Permit #16 or in an individual permit to specify receiving waters of the United States for return flow from a contained upland disposal site. However, the District Engineer cannot prohibit the discharge of return flow effluent over upland areas, which are not jurisdictional under Section 404 of the Clean Water Act. Also, nowhere in the administrative record is there any discussion or evaluation supporting the imposition of this special condition. As noted above, 33 CFR 325.4(a) requires that the imposition of special conditions should be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

The Buffalo District Engineer shall reassess the imposition of Special Condition #9 with respect to its prohibition on return flow being discharged over upland and shall evaluate the imposition of this special condition in accordance with the requirements of 33 CFR 325.4(a).

**Reason 5: Duplicative Agency Review:** “Special Condition number 16 requires review by the USEPA and the United States Department of the Interior Fish & Wildlife Service. The NYSCC understands these agencies may have comments during the permit application review process; however to the extent practicable, the NYSCC strongly believes the Water Quality Certification administered by the NYSDEC must take precedence.”

**Finding:** This reason for appeal does not have merit.

**Action:** None required.

**Discussion:** The Canal Corporation objects to the imposition of Special Condition #16, which requires submission of pre-dredge reports, sediment sampling and testing plan reports in order to authorize proceeding with “wet dump” dredging to the Buffalo District, the U.S. Environmental Protection Agency, and the U.S. Fish & Wildlife Service. The Canal Corporation believes that this requirement creates a duplicative review process and that the NYSDEC Section 401 Water Quality Certification must take precedence over the requirement to acquire and submit this information.

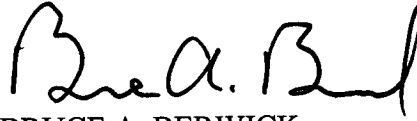
Notwithstanding the Canal Corporation’s position, the imposition of this special permit condition is not unreasonable within the overall framework of the special conditions included in the proffered permit. The expertise and input of the two aforementioned agencies in their review of this information would be a vital and necessary component of the Buffalo District’s public interest decision whether to authorize “wet dump” dredging activities on a site-specific basis. As stated previously in this decision document, the issue of duplicative agency review is in and of itself not appealable.

**Information Received During the Appeal Review and its Disposition:**

1. The Buffalo District provided a copy of the administrative record, which was reviewed and considered in the appeal review process along with the results of the 20 September 2005 appeal conference.
2. Prior to the appeal conference, the Canal Corporation provided to both the Review Officer and the Buffalo District a copy of a 19 February 1999 letter from the district to NYSDEC. The Review Officer and the Buffalo District agreed that the letter should be part of the administrative record for this permit application.
3. During the meeting the Canal Corporation provided two pieces of clarifying information: one was a map of the Rochester, New York area showing the canal, permitted dredging sites, and a half-mile radius surrounding permitted upland disposal sites, and the second was a timeline showing with the schedule for the process for completion of Tier 1 and 2 dredged material analysis and approval by the district, as mandated by special condition of the proffered permit for dredging with “wet dumping”. The undersigned accepted these in accordance with 33 CFR 331.7(e)(6).

New York State Canal Corporation  
Buffalo District File No. 2004-01156(0)

**Conclusion: I remand this proffered permit decision to the Buffalo District for reconsideration of the items I have specifically identified as described in detail in this administrative appeal decision.**

A handwritten signature in black ink, appearing to read "B. A. Berwick", with a stylized, cursive script.

BRUCE A. BERWICK  
Brigadier General, U.S. Army  
Commanding